LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 2 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

EVENING NEWS ASSOCIATION
and MARTIN S. HAYDEN,
Petitioners,

vs.

PATRICIA ARBER, et al,
Respondents.

No. 1016

PETITIONERS' REPLY TO RESPONDENTS' OBJECTIONS TO ISSUANCE OF WRITS OF CERTIORARI

George E. Brand, Jr.
1881 First National Building
Detroit, Michigan 48226
963-8142
Attorney for Petitioners

Rockwell T. Gust
Frank G. Pollock
Butzel, Eaman, Long, Gust & Kennedy
1881 First National Building
Detroit, Michigan 48226
963-8142
Of Counsel

THE INLAND PRESS, DETROIT, MICHIGAN

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

EVENING NEWS ASSOCIATION and MARTIN S. HAYDEN, Petitioners,

vs.

PATRICIA ARBER, et al, Respondents.

No. 1016

PETITIONERS' REPLY TO RESPONDENTS' OBJECTIONS TO ISSUANCE OF WRITS OF CERTIORARI

Respondents now tacitly concede that the newspaper report published by the petitioning newspaper and its Editor is privileged and unactionable. Respondents now assert that their claim against the newspaper and its Editor is *not* based upon the newspaper reporting of Exhibit "A" but solely upon the preparation and other distribution of Exhibit "A", Senator Stahlin's letter and Complaint to the Michigan Fair Campaign Practices Commission (Respondents' Objections, pp.28-29; see also pp. 1-2). Respondents' inconsistent position below is amply reflected in the opinions of both the trial court and the Court of Appeals (Appendix to Petition, pp. 5a-49a). Respondents' now limited claim is that the petitioning Editor and a non-de-

fendant reporter encouraged the publication of Exhibit "A" and were the source of some of the information used in its preparation.

Fortunately in view of this turn of events, the constitutional privilege to publish Exhibit "A" as well as the newspaper report was asserted in the motion for summary judgment filed by these Petitioners. The specific applicability of the privilege to the publication of Exhibit "A" is amply treated in the companion petition for certiorari filed by Senator Stahlin (No. 1021). In the final analysis, the privilege to communicate charges of political misconduct to the concerned electorate, or to the chairman of the investigatory commission established by the state with copies to the members of the commission, or to the press for communication to the electorate is the same basic constitutional privilege and that privilege involves only one pivotal question: Did the accused publisher act with constitutionally required malice, with knowledge of falsity or recklessness as to truth or falsity? Herein the determinative question is not how or to what extent these Petitioners published but whether the affidavits show any genuine issue as to their lack of malice in doing whatever they did.

Petitioners' affidavits, both of its Editor and of its reporter, Mr. Engle who is not a defendant, establish that these Petitioners did *not* believe that any of the statements made in Exhibit "A" were false and that they acted in reliance upon Senator Stahlin and the specific assurance of his representative, Mr. Ferry, that the charges made in Exhibit "A" could be substantiated (Appendix to Petition, pp. 58a-60a). Respondents' only showing in opposition, the affidavit of Mr. Ferry, not only did *not* dispute Petitioners' lack of knowledge of falsity and Petitioners' reliance upon his own representations, but itself affirma-

tively added that the charges were in fact believed to be true by Senator Stahlin, by Mr. Ferry, and by nearly every facet of the Party leadership (Appendix to Petition, pp. 70a, 72a).

Respondents now argue (Respondents' Objections, p. 40) that Ferry's affidavit also says that Exhibit "A" "included" information given Ferry by the non-defendant reporter, Mr. Engle, and that the Ferry affidavit also contains the *hearsay* that Petitioners had promised Senator Stahlin editorial support in his campaign if he would make a public attack on Mr. Durant, the candidate supported by Respondents. Neither assertion is of significance.

Actually, Mr. Ferry's affidavit merely states that he, Ferry, "*** wrote Exhibit A, using material from the following sources *** From Glenn Engle ***" (Petitioners' Appendix, pp. 71a-72a). But the real vice of Respondents' argument is the failure to advise this court that Mr. Ferry's affidavit also specifically states that Engle, as well as a host of others, confirmed the accuracy of the material:

> "That the subject of the attack, and the gossip to be used to make this attack (which later took the form of Exhibit A) were discussed by deponent with Elly Peterson, Norman Stockmeyer, Jack Gibbs, Donald DeRosen, Richard Van Dusen, Herman McKinney, Paul Bagwell, *Glenn Engle*, and others in the Republican party, including then State Senator Stanley Thayer; *that all of the above*, with the possible exception of Stanley Thayer, *confirmed the accuracy* of the gossip which was later used in Exhibit A; ***." (Petitioners' Appendix, pp. 67a-68a; emphasis added).

There is no dispute between the Ferry affidavit and the Engle and Hayden affidavits as to the fact that Petitioners

did *not* believe that any of the statements contained in Exhibit "A" were false.

Finally, as to the hearsay it is sufficient to note that not only do personal motives, even to the extent of ill will, play no part in the consideration of *Times* privilege but that political opposition to a candidate for public office is a constitutional right, not a constitutional disability.

Respectfully submitted,

George E. Brand, Jr.
1881 First National Building
Detroit, Michigan 48226

Rockwell T. Gust
Frank G. Pollock
Butzel, Eaman, Long, Gust & Kennedy
1881 First National Building
Detroit, Michigan 48226
Of Counsel